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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 174.

JOHN D. BOERING AND MEARLIN G. BOERING,
HIS WIFE, PLAINTIFFS IN ERROR,

vs.

CHESAPEAKE BEACH RAILWAY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

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Statement of the Case.

This was an action by plaintiffs in error to recover damages for personal injuries suffered by the female plaintiff as the result of the alleged negligence of the defendant. The male plaintiff in error is said to have been joined merely

"for conformity," and no injuries or damages are alleged to have been inflicted upon him personally, nor is any recovery sought to be obtained in his individual right.

It appears from the bill of exceptions that on September 2, 1900, the female plaintiff, together with her husband and another, went to Chesapeake Beach on the cars of the defendant, and while on the return journey the train in which they were riding ran into an open switch and collided with a train of empty coaches, throwing the female plaintiff from her seat into the aisle, where she was trampled upon by other passengers and thereby severely injured.

It also appears that there were no lights on the switch nor any switchman at the place of the accident, and there was some evidence tending to show that it was usual and customary to have either a light or a switchman at railroad yard sidings, such as this was.

At the time of the accident the female plaintiff was riding in the cars of the defendant upon a FREE PASS, containing on its face, among other things, the following:

"Chesapeake Beach railway.

"1900.

"Pass Mrs. J. D. Boering. Complimentary. Until De-
"cember 31st unless otherwise ordered."

And on its back:

"Not transferable. The person accepting and using this
"pass thereby assumes all risk of accident and damage to
"person or property, whether caused by negligence of the
"company's agents or otherwise."

At the trial the pass having been produced by the plaintiff, who was a witness in her own behalf, and she having

testified that she had not bought any ticket from the defendant; that her husband attended to her "transportation;" that she was sitting in the seat with her husband when the conductor came along, and that he exhibited the "card" or pass to the conductor as evidencing her right to ride on the train; that she had not seen the "card" or pass before the accident—it (the pass) was, on the offer of the defendant, admitted in evidence notwithstanding the objection of plaintiffs' attorney, who noted an exception to the ruling.

Thereupon the male plaintiff was recalled to the stand and testified that the pass admitted in evidence was given to him in connection with four other passes, one of which was for Mr. Shoemaker, general manager of the Moxley advertising service; one for Mrs. Shoemaker, his wife; one for Mr. Edwards, the Baltimore agent of the advertising service, and the remaining one for himself; that all of said passes were issued at the same time and pursuant to the same conversation with General Passenger Agent Lewis, of the defendant company; and thereupon the plaintiff produced and the court admitted in evidence the pass issued to the witness (the male plaintiff), which, among other things, bore on its face the following:

"Chesapeake Beach railway.

"1900.

"Pass Mr. J. D. Boering. Acc. adv. contract Moxley ad. service."

And on its back appeared the same conditions as on the other.

The male plaintiff had told Mrs. Boering that he had pro-

cured "transportation" over defendant's railway "in conjunction with the contract of advertising" (p. 12).

He and Mrs. Boering had been to Chesapeake Beach on defendant's railway before the date of the accident, on other occasions, when they used these passes.

The court, at the instance of the plaintiffs, instructed the jury that—

(1st Prayer.) "If the jury find from the evidence that the plaintiff Mearlin G. Boering, (the female plaintiff,) while on the cars of the defendant, was injured by the negligence of the defendant, and that the plaintiff was riding on a ticket from (for) which value had been given, then your verdict should be for the plaintiff, and you are instructed that the defendant is not exonerated from liability in any degree from damages occasioned by such negligence by reason of any circumstances or conditions with reference to the defendant railway company's compensation for transporting the plaintiff."

And also that—

(4th Prayer.) "If the jury shall find in favor of the plaintiff, then in estimating damages you are to take into consideration the nature and extent of the injuries to the plaintiff and the pain attending thereupon and naturally incident thereto; the character and extent of her physical disability and the shock to her nervous system and results thereof resulting from such injuries, and return a verdict for what in money would be a fair recompense for the injuries received and suffering undergone by the plaintiff."

It will be seen from the foregoing statement that the trial justice left for the determination of the jury not *only* the question of negligence *vel non*, but also the question whether the female plaintiff at the time of the accident was in fact, as is averred in the declaration, "a passenger for hire upon one of the trains" of the defendant, or, as set up

by the defendant's third plea (p. 5), "was riding upon a passenger train of said defendant upon and by virtue of a free pass which had been issued and given to said female plaintiff and accepted by her as a mere gratuity, and without any consideration having been received from her therefor, and upon the condition printed in legible type upon the back thereof, to wit:

"The person accepting and using this pass thereby assumes all risk of accident and damage to person or property, whether caused by negligence of the company's agents or otherwise."

The jury, having retired, returned its verdict for the defendant. Upon this verdict judgment was entered and this judgment was affirmed upon appeal to the Court of Appeals.

The question as to whether the pass upon which the female plaintiff was riding had been issued to her for value or not having been resolved by the jury against her and in favor of the defendant, the questions for the consideration of this learned tribunal on appeal are only those touching the admissibility of the pass in evidence and the refusal of the trial justice to instruct the jury in accordance with plaintiffs' third prayer (p. 13).

ARGUMENT.

I.

The first point presented by the plaintiff in error (Brief, 4) involves the validity and effect "of a stipulation printed on the back of a free pass purporting to relieve a railway carrier from liability to a gratuitous passenger from injury

caused by negligence of the carrier," and seems to require no attention from us in view of the recent conclusion of that discussion by this court in the case of Northern Pacific Railway Company vs. Louise H. Adams and Frank H. Adams, No. 143, October term, 1903, decided February 23, 1904.

II.

Is the case at bar distinguishable in any of its salient features from the Adams case?

This brings us to the second proposition upon which counsel for plaintiff in error rely, namely, "Whether such exemption can be extended to the case of a married woman who was injured while riding on the invitation of her husband, an advertising solicitor, to whom the pass had been issued in her name, but without her knowledge or request, and of the stipulation on the back of which she was ignorant at the time of the injury and whose only knowledge concerning the same was that it was 'transportation procured in conjunction with a contract for advertising.'"

Although the answers of the female plaintiff were cunningly framed to evade the admission, it cannot be doubted that she was fully aware that she was traveling upon a *free* pass. She testified that Mr. Boering attended to her transportation, and that he did not buy a ticket for her, and that he did buy a ticket for a guest, a Mr. Burke; that she was sitting in the seat with her husband and saw him present to the conductor "them cards," and also the *ticket* which he had bought for their guest. She saw him handle these *cards* and present them to the conductor (9–10). Mr. Boering testified that his wife had accompanied him on other

trips that summer to Chesapeake Beach, and on such occasions had made use of this same transportation.

Having used and enjoyed the benefits of the gratuitous "transportation," no matter by whom procured, she by such use and enjoyment became bound by the conditions upon which the "transportation" was issued; which conditions were plainly printed upon and formed a part of the so-called "transportation" or pass itself. By omitting, neglecting, or refusing to inform herself as to the conditions upon which the pass had been issued, she could not enjoy its privileges and at the same time avoid its obligations. Being a woman of at least ordinary intelligence, and presumably *sui juris*, she must be presumed to have done what at least it was her duty to have done, namely, to have informed herself as to the conditions under which she and her husband were enjoying the hospitality of the defendant company. The means of knowledge were immediately at hand. Even if her husband who procured the passes for both thought that it was "immaterial to her" (p. 12) whether same were issued upon conditions or not, it seems plain that it was her duty to have informed herself thereabouts.

The pass was rightfully admitted in evidence. It alone served to distinguish her from a mere trespasser upon the train.

If, as plaintiffs' attorneys seemed to think was the case, the jury could infer from the fact that she was on the passenger train that she was legally there, then it was surely competent for the defendant, on cross-examination, to develop affirmatively the precise conditions under which she was being carried, and having elicited from her the fact

that she was riding upon the train by virtue of the possession of a pass, it seems clear that the pass itself and all the writing and printing upon it were admissible as evidence of the engagement or agreement between the parties in the premises, the effect of the stipulations printed upon the pass and their validity being questions of law for the sole determination, in the first instance, of the trial justice.

Whether the female plaintiff had actual knowledge of the conditions and their effect was immaterial.

Muldoon *vs.* Seattle Railway Co., 10 Washington, 310.

For even though the conditions by their terms require that the party using the pass should sign the same, if he does not in fact sign the same, yet uses the pass, he will be estopped to deny that he made the agreement specified thereon.

Quimby *vs.* Boston & Maine R. R. Co., 150 Massachusetts, 365.

Illinois Central R. R. Co. *vs.* Read, 37 Illinois, 486.

If the female plaintiff was bound by the conditions printed upon the pass which had been exhibited to defendant's conductor as establishing her right to be upon the train, it seems clear that the remaining questions which plaintiffs' attorney put to the male plaintiff and which the trial justice refused to allow him to answer were immaterial and no error arose from such refusal (Rec., p. 13, 4th assignment of error, Pl'ffs' Brief, pp. 3 and 4).

The questions were excluded by the trial justice on the ground that they were not proper on redirect examination and if admissible at all should have been put in the course of the examination-in-chief (R., 13).

Matters of this sort relating entirely to the order of proof and resting solely within the discretion of the trial justice do not afford a basis for reversal in appellate tribunals.

Jones on Evidence, vol. 3, secs. 809, 811.

"It is very clear that it is no abuse of discretion if the court refuses to allow the introduction of evidence out of its order when it is apparent that the relaxation of the general rule would further a mere trick or scheme or operate as a fraud upon one of the parties or encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed."

3 Jones on Evidence, sec. 811.

The rule upon this subject is well stated by Mr. Justice Story in the case of The Philadelphia & Trenton R. R. Co. *vs.* Stimpson (14 Pet., 448, 462), as follows:

"The mode of conducting trials, the order of introducing evidence, and the time when it is to be introduced, are, properly, matters belonging to the practice of the circuit courts, with which this court ought not to interfere; unless it shall choose to prescribe some fixed, general rules on the subject, under the authority of the act of Congress. Probably, the practice in no two States of the Union is exactly the same; and therefore, in each State, the circuit courts must necessarily be vested with a large discretion, in the regulation of their practice. If every party had a right to introduce evidence, at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious, that the proceedings of the court would often be embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against. It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to inter-

fere with the exercise of this discretion; and, indeed, if we were called upon to say, upon the present record, whether this discretion was, in fact, misapplied or not, we should be prepared to say that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. It is sufficient for us, however, that it was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the circuit court."

III.

If the cause of action in this case for a breach of a contract to carry is that of the wife alone, as held by the Court of Appeals of the District of Columbia in Rockwell *vs.* Traction Company (17 App. D. C., 369–380), then it logically follows that the right to contract for such carriage was her own individual right, and that her husband, in attending to her "transportation," as she expressed it, was acting in the matter as her agent, and bound her by accepting for her a complimentary pass containing the conditions exempting the company from liability in case of accident.

The power of a husband to act as the agent of his wife in relation to her separate or individual personal or property rights is well settled.

Voorhees *vs.* Bonesteel & Wife, 16 Wall., 16.

Aldridge *vs.* Muirhead, 101 U. S., 397.

Weisbrod *vs.* Chicago, etc., Ry. Co., 18 Wis., 35.

And other cases cited in 1 A. & E. Enc. Law (2d ed.), 947–'8.

If, on the other hand, the conclusion of the same court in the case of Howard *vs.* Chesapeake and Ohio Railway Company (11 App. D. C., 300–337), holding that the right of action for personal injuries sustained by the wife is not the

statutory property of the wife, be, as we think it is, a correct statement of the law of this District on that subject, then, at the time this cause of action arose and suit thereon was instituted, the common-law rule prevailed in this District and the female plaintiff could not have sued without joining her husband in such action, as she did do. Any damages recovered or reduced to possession as a result of such joint action during the coverture would have been the property of the husband alone. This right to the proceeds of the litigation carries with it the right of the husband to release the entire right of action for damages, whether after judgment or before suit brought.

Anderson *vs.* Anderson, 11 Bush. (Ky.), 327.
Ballard *vs.* Russell, 33 Me., 196; 54 Am. Dec., 620.
Southworth *vs.* Packard, 7 Mass., 95.
Beach *vs.* Beach, 2 Hill (N. Y.), 260; 38 Am. Dec., 584.
Long *vs.* Morrison, 14 Ind., 597; and other cases cited in—
15 A. & E. Enc. Law (2d ed.), 859, and
24 A. & E. Enc. Law (2 ed.), 297.

If the husband could release the wife's right of action for damages before or after suit brought it is difficult to see why he could not a pre-release in the form of a condition upon a free pass containing an exemption from liability, waive or bar her right to recover for personal injuries sustained while traveling on such pass.

The validity of a pre-release of an action for personal injuries was considered and sustained by this court in the case

of Baltimore & Ohio S. W. Railway Company *vs.* Voigt, 176 U. S., 498.

It is respectfully submitted that the concurring judgments of the two lower courts should be affirmed.

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MARCH, 1900.